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Mark B. Quatt			TRAN LIEN, THUY	
Cryovac, Inc.				
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* PARIMAL VADHAR, SEAN BRADY, MICHAEL ROSINSKI,  
JEFF WOMACK, and JOSEPH OWENSBY

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Appeal 2009-010189  
Application 10/051,584  
Technology Center 1700

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Before EDWARD C. KIMLIN, BEVERLY A. FRANKLIN, and  
KAREN M. HASTINGS, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 23 and 25-29, which are the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

I. BACKGROUND

The invention relates to a microwaveable vacuum skin package which may be used in food packaging. Independent claim 23 is illustrative (emphasis added):

23. A microwaveable vacuum skin package comprising:
  - a) a support member having an upper surface and a lower surface;
  - b) a bottom web having an upper surface and a lower surface, the lower surface of the bottom web being adhered to the upper surface of the support member;
  - c) a food product disposed on the upper surface of the bottom web; and
  - d) a top web disposed on the food product;

wherein the top web of the vacuum skin package is draped over the food product, by a vacuum skin packaging process, such that the top web substantially conforms to the shape of the food product and a vacuum skin package is thereby produced;

wherein the top web of the vacuum skin package is sealed at its lower surface to the upper surface of the bottom web to form a seal at a location outside the periphery of the food product;

wherein the top of the vacuum skin package comprises a sealant layer comprising an ethylene/alpha olefin copolymer; and

*wherein the bottom web of the vacuum skin package comprises a sealant layer consisting essentially of a blend of*

- i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
- ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer.

Claims 23 and 25-28 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Pockat (US 5,023,121) as evidenced by Genske (US 5,407,751).

Claim 29 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Pockat, as evidenced by Genske, further in view of Shibata (US 4,429,079).

With respect to the first rejection, Appellants' arguments focus on independent claims 23 (Br. 10-12). Accordingly, we address Appellant's arguments regarding the rejection with respect to claim 23 only. *See 37 C.F.R. § 41.37(c)(1)(vii).*

With respect to the second rejection, Appellants provide no new argument for this rejection and instead refer to the arguments made regarding claim 23 in the § 102 rejection (Br. 12). Therefore, the § 103 rejection of claim 29 stands or falls with our decision regarding the rejection of independent claim 23.

#### ISSUE ON APPEAL

Has the Examiner erred in determining that claim 23 is anticipated by Pockat; specifically, does Appellants' use of "consisting essentially of" in claim 23 excludes the polybutene component that is included in Pockat's sealant layer 26?

For the reasons that follow, we answer this question in the negative.

#### OPINION

##### *Findings of Fact*

We adopt the Examiner's findings in the Answer and Final Office Action as our own. We add the following factual finding for emphasis:

Appellants' Specification does not contain an explicit definition of what is included or excluded by the term "consisting essentially of" with respect to the bottom web sealant layer. The two components listed in Appellants' claim 23 for the sealant layer of the bottom web may total as little as 70 % by weight of the sealant layer, thus leaving a substantial portion (*i.e.*, 30 wt. %) of the sealant layer components potentially unspecified.

#### *Principles of Law*

It is well settled that the transition term "consisting essentially of," when used with compositions, means that other ingredients in any amounts may be included in the scope of the composition as long as these ingredients do not materially affect the basic and novel characteristics of the composition. *See PPG Indus., Inc. v. Guardian Indus. Corp.*, 156 F.3d 1351, 1354 (Fed. Cir. 1998). Appellants have the burden of establishing what is excluded by "consisting essentially of," especially when the specification clearly indicates that other components may be present as well. *See In re Herz*, 537 F.2d 549, 551-52 (CCPA 1976).

It is well established that argument by counsel cannot take the place of evidence. *See In re Geisler*, 116 F.3d 1465, 1471 (Fed. Cir. 1997).

#### *Analysis*

Appellants do not dispute that Pockat describes all the elements listed in claim 23 (Br. *generally*). Rather, Appellants' sole contention is that the use of "consisting essentially of" in claim 23 excludes the polybutene component that is included in Pockat's bottom sealant layer 26 (Br. 10).

With regard to the transition term "consisting essentially of" required for the bottom web sealant layer of claim 23 on appeal, we determine that

Appellants have not shown that this term excludes the polybutene component disclosed by Pockat. To the contrary, 30% of this sealant layer may be components that are not specified in Appellants' claim. Appellants admit that the amount of polybutene in Pockat's sealant layer 26 may be as little as about 6% (Br. 12). Therefore, Appellants' argument is not well taken. *See In re Herz*, 537 F.2d at 551-52.

As aptly noted by the Examiner, Appellants do not present any evidence that the use of polybutene will have a material impact on the basic and novel characteristics of the sealant layer (Ans. 5). Appellants have not shown that the scope of the polybutene component taught in the sealant layer 26 of Pockat, either in amount or type, would have a material impact on the basic and novel characteristics of their invention. *See PPG*, 156 F.3d at 1354. Appellants' mere conclusion that "any significant amount of polybutene in the sealant layer can be reasonably expected to materially affect the basic and novel characteristics [of] applicant's invention" (Br. 12) is insufficient. Appellants have provided no persuasive data, scientific evidence or reasoning as to why the prior art polybutene component would have a material impact on the basic and novel characteristics of their invention.

We again emphasize that it is Appellant's burden to establish that an ingredient included in a prior art composition is excluded from the claims by "consisting essentially of" language. *See In re Herz*, 537 F.2d at 551-52. Appellants have not presented the requisite evidence to satisfy this burden for the foregoing reasons and those stated in the Answer.

Therefore, we affirm the Examiner's § 102 rejection of claims 23, and 25-28, as well as the § 103 rejection of claim 29.

ORDER

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

AFFIRMED

tc

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